IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1882

BENSON WOLMAN, *et al.*,

Appellants,

v.

FRANKLIN B. WALTER, *et al.*,

Appellees.

On Appeal from the United States District Court for the Southern District of Ohio Eastern Division

MOTION TO AFFIRM OF APPELLEES JAMES GRIT, et al.

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Pursuant to Rule 16(1) of the Rules of the Supreme Court of the United States, the individual appellees move this Court to affirm the decision of the District Court on the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

STATEMENT OF CASE AND FACTS

This action was filed on November 18, 1975 under 28 U.S.C. §§2281, 2284 seeking a declaration that Ohio Revised Code §3317.06 was unconstitutional under the First and Fourteenth Amendments, and requesting an injunction against its enforcement. The District Court subsequently granted the appellants' motion for a temporary restraining order preventing the appellees from enforcing the statute. This injunction remained in effect from December 10, 1975 through July 21, 1976.

The injunction, however, was vacated when the three-judge court unanimously upheld the statute's constitutionality. *Wolman* v. *Essex*, 417 F.Supp. 1113 (S.D. Ohio 1976). Applications for stay pending appeal to this Court were denied by Justice Stewart and Justice Marshall. Thus, the statute, as affirmed by the three-judge Court, was in full force during the 1976-1977 school year. On June 24, 1977, this Court rendered its opinion on the constitutionality of the statute. *Wolman* v. *Walter*, 433 U.S. 229 (1977). While the bulk of the statute was found to pass constitutional muster, the portions related to providing instructional equipment and materials as well as reimbursement for field trips were found to exceed the limits imposed by the First and Fourteenth Amendments.

The case was remanded to the District Court for further proceedings in conformity with this Court's opinion. The District Court entered judgment on the mandate, declared the partial invalidity of the statute, and enjoined its enforcement. (Opinion Reprinted in Jurisdictional Statement at A1-A4.) In short, the District Court granted the appellants the precise relief for which they had prayed in their complaint. Not satisfied with this order, however, the appellants made an additional request that the equipment and materials provided to the nonpublic school pupils prior to this Court's decision be returned to the state. The District

Court, after balancing the competing constitutional equities involved, denied the motion. This appeal followed that denial.

ARGUMENT

The decision of the District Court resulted from the application of well-established principles and was plainly correct. Despite appellants' statements to the contrary, the "problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (*Lemon II*). The appellants are simply asking this Court "to re-examine the District Court's evaluation of the proper means of implementing an equitable decree." *Lemon II* at 199-200. The tests to be applied by the District Court, however, were thoroughly discussed in *Lemon II*, and have been consistently adhered to by this Court. *Roemer* v. *Maryland Public Works Board*, 426 U.S. 736, 767 n. 23 (1976). The District Court recognized these precedents and explicitly applied them to the present case. In short, the instant case raises no new substantive issues not previously resolved by controlling precedent of this Court. The District Court's decision should be affirmed.

The appellants seek review of the denial of an injunction which would require the return of instructional materials and equipment provided under Ohio Revised Code §3317.06 during the period between the District Court's unanimous decision sustaining the constitutionality of the statute and this Court's decision finding that portions of the statute violated the Establishment Clause. The only issue presented by this appeal, then, is whether the District Court was required to order the return of the materials and equipment.

The proper standard to be applied by the District Court in resolving this issue was established in *Lemon II*. Rather than apply any absolute doctrine of the retroactivity of a constitutional adjudication, the District Court must look to the "practical realities" of each case in determining the proper scope of any requested equitable remedy:

> *In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow.* [Citations omitted.] Moreover, in constitutional adjudication as elsewhere, *equitable remedies are a special blend of what is necessary, what is fair, and what is workable.* "Traditionally, equity has been characterized by a *practical flexibility* in shaping its remedies and by a facility for adjusting and reconciling public and private needs." [Citation omitted.] Mr. Justice Douglas, speaking for the Court, has said,
>
> > "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims." [Citation omitted.]
>
> In equity, as nowhere else, courts eschew rigid absolutes and look to the *practical realities* and necessities inescapably involved in reconciling competing interests, notwithstanding that those interests have constitutional roots.
>
> [411 U.S. at 200-201 (emphasis added).]

In the present case, the District Court applied this test, balanced the competing interests, and concluded that the "practical realities" of the case required that the appellants' motion be denied:

At the outset, the Court observes that the defendants joined as parties by the plaintiffs, with the exception of the Columbus School Board, are not the most appropriate parties for achieving the physical return of the materials and equipment. With this in mind, other factors relevant to the consideration of the motion weigh much more heavily against granting the relief sought by the motion.

The equipment sought to be recovered includes such items as projectors, record players, maps, globes and science kits. All these items, it would seem to this Court, are subject to eventual obsolescence. Thus the risk of further impairment of constitutional interests is inherently limited by the passage of time. Moreover, the denial of the retroactive relief sought by the plaintiffs would obviate any risk of unconstitutional entanglement with non-public school personnel by public officials.

Furthermore, the equipment and materials made available to the non-public students and their parents are, in accordance with the statutory scheme, necessarily duplicative of equipment and materials already available in the public schools of each school district. Thus, when balanced against the minimal impairment of constitutional interests, the virtual futility of the retroactive relief sought by the plaintiffs assumes much larger proportions.

On balance, then, and considering all the factors involved, the Court determines that its discretion is better exercised in denying the relief requested by the plaintiffs in this motion.

[*Wolman* v. *Essex*, C-2-75-792 (S.D.Ohio, Mar. 21, 1979) set out in Jurisdictional Statement at A3-A4.]

In other words, the practical realities weighed most heavily in favor of denying the appellants' motion. The return of the

materials, to paraphrase *Lemon II*, is not fair, not necessary, and not workable.

The appellants apparently assume that it would be a simple task to send trucks out to the schools, pick up the materials, and then deliver them to the public school children. An assumption that the public school administrators want the materials would in some instances be quite inaccurate. These materials were made available in nonpublic schools only to the extent that they were already available in the public schools. Ohio Revised Code §3317.06(B) and (C). To the extent that the materials are depreciated or border on obsolescence, it would be futile for the Court to order the materials to be given to the public schools. Even if the public school officials in some districts would like to use the repossessed materials, they could not do so because it would be contrary to Ohio law.

The funds received by a political subdivision of Ohio and designated for a limited purpose may only be expended for that purpose:

> All revenue derived from a source other than the general property tax and which the law prescribes shall be used for a particular purpose, shall be paid into a special fund for such purpose.
>
> * * *
>
> Money paid into any fund shall be used only for the purposes for which such fund is established.

[Ohio Revised Code §5705.10.]

See also, Article II, §22 of the Ohio Constitution which requires that no money be expended except pursuant to "a specific appropriation." Local public school boards, as creatures of statute, may only proceed pursuant to explicit statutory authorization. *Perkins* v. *Bright*, 109 Ohio St. 14 (1923); *Schwing* v. *McClure*, 120 Ohio St. 335 (1929). Thus,

funds appropriated to local public school boards by the General Assembly may only be used for the purposes designated in the statute.

In the present case, the statute clearly limits the power of the local public school boards, to whom the funds are given (Ohio Revised Code §3317.024(P)), to utilize the equipment purchased under the statute. The funds are to be used "to purchase and to loan to pupils attending nonpublic schools within the district" instructional materials and equipment. Ohio Revised Code §3317.06(B) and (C). The language of the statute is mandatory: "Monies paid to school districts under subdivision (P) of §3317.024 of the Revised Code *shall be used* for the following independent and fully severable purposes." Ohio Revised Code §3317.06 (emphasis added). Thus, under Ohio law the property may only be loaned to pupils attending nonpublic schools. There is no statutory authorization, and thus no power on the part of the local school board, to use the property for any other purpose. Thus, any property returned under a court order could not be used by the public school districts.

Ohio Revised Code §5705.10 also limits the application of the proceeds obtained from any sale of the loaned materials and equipment:

> Proceeds from the sale of property other than a permanent improvement shall be paid into the fund from which such property was acquired or is maintained, or if there is no such fund, into the general fund.

The sale of materials would be by public auction pursuant to Ohio Revised Code §3313.41. Ohio Revised Code §3317.06 indicates that monies appropriated to the school districts under that statute are to be used for the following "independent and fully severable purposes." Thus, funds allocated under the program may be used for any of the constitutional services provided by the statute. The proceeds from any sale would thus be returned to the funds

held by the public school districts which provide services to nonpublic school pupils which have been declared constitutional by this Court.

A scenario that would follow an order such as that sought by the appellants would go something like this: First, local public school districts (if they were joined as parties) would have to accomplish an inventory of all materials that have been lent to the nonpublic school pupils. This would require on-site inspection and inventory at all of the nonpublic schools and analysis of all of the public school records. Thereafter, a decision would be made with respect to the transportation of all such materials to warehouse storage. The next step would involve the expenditure of public funds for the purpose of advertising and conducting competitive bidding at 616 separate auctions (one each per public school district). When the 616 public auctions are held, the most likely bidders would be the nonpublic schools. Public school districts, by the very nature of things, already have the same materials and equipment, and because it is constitutional to continue to provide them to public school pupils, public funds are available to buy new rather than used, depreciated, or obsolete items.

Thus, we would observe the strange specter of substantial expenditure of public monies for naught. In most instances, the materials would end up where they started out, and the funds derived from public bidding would be required by law to be placed into funds set aside by local school districts to provide constitutional services for nonpublic school pupils. In short, the used materials and equipment would be sold in a distress auction to the same institutions which are presently using them—but only after a costly and difficult repossession and sale. Such a result would not be consistent with traditional principles of equity. Equity has never required the doing of a vain or useless act. *Mitchell* v. *Chambers Constr. Co.*, 214 F.2d. 515, 517 (10th Cir. 1954).

Lemon II made it clear that these kinds of draconian, retrospective decrees, are not required when they are not consistent with traditional equitable considerations.

Perhaps recognizing that the application of *Lemon II* to the present case requires affirmance of the District Court, the appellants' attempt to distinguish *Lemon II*. While that case is important here more for the guidelines that it establishes for District Courts in fashioning equitable decrees than for its specific factual background, the appellants' purported factual distinctions also prove to be unpersuasive. The basic thrust of their argument is that the District Court's decision leaving the materials in the schools permits an ongoing violation of the Establishment Clause and perpetuates entanglement by the public authorities. The appellants argue that the *Lemon II* decision, allowing reimbursement, did not have this result. Jurisdictional Statement at 11, 13-14. This argument is a classic example of a distinction without a difference.

The *Lemon II* court confronted a situation in which funds were paid to sectarian schools to reimburse them for the purchase of "instructional materials for mathematics, modern foreign language, physical science, and physical education courses." *Lemon II* at 194. These items are similar to those provided under the terms of Ohio Revised Code §3317.06(B) and (C). The materials in *Lemon II*, once paid for, remained in the schools just as the materials at issue here would remain available to the children at sectarian schools. This continued availability of materials, however, does not make the District Court's decision invalid as allowing an "ongoing violation," any more than *Lemon II* resulted in an "ongoing violation."

Nor does the District Court's determination result in excessive continued entanglement between state and secular authorities. Indeed, as this Court concluded in *Meek* v. *Pittenger*, 421 U.S. 349, 365 (1975), "the material and

equipment that are the subjects of the loan ... are self policing, in that starting as secular, nonideological and neutral, they will not change in use." Absent retroactive relief, the self-policing, secular materials will remain in place until obsolete. The public lending clerks no longer exist. Continued payment of their salaries would have violated the permanent injunction. In short, governmental entanglement would take place only if appellants' proposed "draconian" order had to be implemented. See *Roemer* at 767, n. 23. As in *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970), the granting of the required relief would "expand the involvement of government ... and the direct confrontations and conflicts that follow in the train of those legal processes."

The appellants' attempted analogy of this case to *New York* v. *Cathedral Academy*, 434 U.S. 125 (1977) fares no better under scrutiny. An analysis of the factual context of *Cathedral Academy* reveals little resemblance between it and the present case. In *Cathedral Academy*, the District Court had struck down a state reimbursement plan for certain expenses. The Court, in fashioning its equitable remedy, ordered that no reimbursement be made even for amounts already paid out. 434 U.S. at 139. Of course, under *Lemon II*, the District Court, after balancing the equities involved, was authorized to enter such an order. The New York legislature, however, chose to enact a statute which provided for reimbursement of the amounts, despite the court's order. The issue before this Court then was whether "a state legislature may effectively modify a federal court's injunction?" *Cathedral Academy* at 130. In short, this Court was reviewing an act of the New York legislature, not a District Court's exercise of its equitable discretion. The decision simply held that nothing in *Lemon II* gave the legislative branches of state government the power to review or modify the decrees of federal courts. The opinion in no

way limited the applicability of *Lemon II* to decisions of federal courts.

CONCLUSION

The "problem of the instant case is essentially one relating to the appropriate scope of federal equitable remedies, a problem arising from enforcement of a state statute during the period before it had been declared unconstitutional." *Lemon II*, at 199. As such, this case falls squarely within the parameters of *Lemon II* and is controlled by its principles. The District Court properly applied those principles, and, after balancing the constitutional equities, denied the appellants' request for retroactive relief. There is no new substantive constitutional issue involved here, nor is there any question as to the standards applicable to the District Court's decision. The questions upon which the decision of this case depends are simply not substantial

The decision of the District Court should be affirmed.

Respectfully submitted,

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